STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 26, 2010
v	No. 287996 Muskegon Circuit Court
KEVIN MICHAEL WYNN, Defendant-Appellant.	LC No. 08-056069-FH

Before: Bandstra, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for breaking and entering with the intent to commit larceny, MCL 750.110. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 46 months to 20 years' imprisonment, the sentence to run consecutive to the sentence for which defendant was on parole at the time he committed the instant offense. We affirm.

Defendant was convicted of breaking and entering with the intent to commit larceny from Hardware Distributors, Inc. On appeal, defendant argues that there was insufficient evidence to support this conviction because he did not steal anything and did not try to steal anything, but rather merely entered the building and "almost immediately jumped back out." Accordingly, defendant asserts that the prosecution did not prove that he had any intent to steal or commit any other crime at the time of the breaking and entering. We disagree.

We review de novo the question whether there was sufficient evidence to support the verdict by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). "The elements of breaking and entering with the intent to commit larceny are: (1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein." *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998).

Defendant plainly admitted during his trial testimony that at the time he forcibly pushed in the window of the building to gain entry to Hardware Distributors, he did so intending to steal money from inside the premises. Controlling precedent provides that there need not be a successful larceny to sustain a conviction for breaking and entering with the intent to commit

larceny; rather, it is only necessary that "the defendant had intended to commit larceny when he broke and entered." *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). See also, *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). Defendant's own testimony was sufficient to prove this intent element beyond a reasonable doubt. MCL 750.110(1); *Toole*, 227 Mich App at 658.

Likewise, defendant's testimony was sufficient to establish that a breaking occurred. "Under Michigan law, any amount of force used to open a door or window to enter the building, no matter how slight, is sufficient to constitute a breaking." *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998), citing *People v Wise*, 134 Mich App 82, 88; 351 NW2d 255 (1984). Defendant admitted that he pushed in the window in order to get into the business. Additionally, one of the owners of Hardware Distributors, Inc., testified that some force would be necessary to push in the window.

Finally, the owner of a nearby business who witnessed defendant's offense testified that he saw defendant jump through the window into the building, and defendant himself admitted that he entered the building, albeit briefly. Certainly, a reasonable-fact-finder could find, based on that evidence, that defendant entered the building. Alternatively, a reasonable fact finder could have inferred that part of defendant's body entered the building when he pushed in the window. *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998) ("Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime"). Hence, the evidence also supports a finding that defendant entered the building. Therefore, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *Herndon*, 246 Mich App at 346.

Defendant also argues on appeal that the trial court failed and/or refused to establish and take into account all mitigating evidence before sentencing him as a fourth habitual offender. Defendant argues that the mitigating factors included: (1) defendant having strong family support and being remorseful; (2) defendant suffering from alcohol and cocaine addiction; and (3) defendant's rehabilitative potential, which would have been brought forth through an assessment. Defendant asserts that because these factors were not considered, his sentence was excessive, inaccurate, and invalid, and consequently, that his sentence results in cruel and unusual punishment and should be vacated. In addition, defendant argues that his trial counsel was ineffective because he failed to object to the length of the sentence and to the trial court's failure and/or refusal to consider the mitigating evidence. We disagree.

Because this issue was not preserved below, we review the trial court's sentencing decision for plain error affecting defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002). A trial court must impose a minimum sentence within the statutory sentencing guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2); *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). A sentence within the guidelines range is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Because defendant was a fourth habitual offender, the sentencing guidelines were scored at 10 to 46 months in prison. Defendant does not dispute the accuracy of the guidelines. The trial court sentenced defendant to a minimum term of 46 months in prison. Therefore, we must affirm defendant's minimum sentence because it was within the guidelines

range and there was no error in scoring or reliance on inaccurate information. MCL 769.34(10); *Babcock*, 469 Mich at 268, 272.[1]

Additionally, contrary to defendant's argument, the trial court properly articulated the reasons for its sentencing decision, which consisted of referring to the guidelines and noting that defendant participated in a lifetime of breaking and entering and being a repeat offender. See *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). Further, while defendant maintains that the trial court failed or refused to consider mitigating factors, he ignores his extensive criminal history, which includes eight misdemeanors and five felonies, four of which involve previous instances of breaking and entering with the intent to commit larceny. Defendant's criminal history underscores his inability to conform his conduct to the rules of society and supports the trial court's sentencing decision. See *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997). Additionally, defendant's assertion that he is remorseful should not be considered a mitigating factor because it is impossible to judge a defendant's subjective intent. See *People v Daniel*, 462 Mich 1, 8 n 9; 609 NW2d 557 (2000). And, there is no factual support for any assertion that defendant was affected by alcohol or cocaine addiction during the period of time surrounding the instant offense. Therefore, defendant has not established that any of the information on which the trial court relied was inaccurate or that the trial court failed to properly consider the factors before it pertinent to determining an appropriate sentence.

Moreover, because defendant's sentence was proportionate, his underlying constitutional claim is without merit because a proportionate sentence does not constitute cruel and unusual punishment. *Powell*, 278 Mich App at 323; *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). And, although defendant's argument focuses on his rehabilitative potential and his allegation that he was suffering from substance abuse, these arguments have no bearing on our review of the trial court's sentencing decision because defendant's minimum sentence fell within the statutory sentencing guidelines and his maximum sentence was authorized by MCL 769.12(1)(a). In addition, the presentence report referenced defendant's medical and substance abuse history. This information satisfied the requirement of MCR 6.425(A)(5), and further assessment was not indicated. Therefore, defendant's claim that his sentence was excessive, inaccurate, and invalid is simply unsupported. Consequently, defendant's assertion that his trial counsel was ineffective for failing to object to that sentence clearly lacks merit. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (defense counsel is not required to raise meritless objections or make futile arguments).

Defendant next argues that the trial court's scoring of the sentencing guidelines variables violated the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has determined that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme wherein a trial court sets a minimum sentence but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Accordingly, where, as here, "the defendant

[1] With respect to the twenty-year maximum, we conclude that the trial court had the authority to set defendant's maximum sentence at life or a lesser term of years, pursuant to MCL 769.12(1)(a).

receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* There was no error.

Finally, defendant asserts that he should be granted jail credit toward his minimum sentence in this case for the time he was incarcerated between his arrest and sentencing, despite having been on parole at the time of his detainment. The Michigan Supreme Court recently decided this issue in *People v Idziak*, 484 Mich 549, 552; 773 NW2d 616 (2009), holding that the jail credit statute, MCL 769.11b, does not apply to parole detainees. Thus, it is unquestionable that defendant is not entitled to jail credit on his sentence for the instant offense. Furthermore, any assertion that defense counsel was ineffective for failing to object to the denial of such credit clearly lacks merit. *Snider*, 239 Mich App at 425.

We affirm.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens